Remedy for Inner City Segregation in the Public Schools: The Necessary Inclusion of Suburbia

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I. INTRODUCTION

The Fourteenth Amendment,[1] since its enactment in 1868, has been the cornerstone of equal protection in the school systems.[2] Under this rubric, the courts first held that each and every citizen of the United States, including African Americans, has a right to an equal education.[3] Shortly thereafter, under *Plessy v. Ferguson*'s[4] "separate but equal" doctrine, the courts held that such a right could be provided in separate yet equal facilities.[5] As a result, dual public school systems[6] were formed.

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[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For a general study of the development of public education prior to the Fourteenth Amendment, see R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE Parts I and II (1953).

[2] The Supreme Court, in its first cases construing the Fourteenth Amendment, interpreted it to mean that all forms of discrimination against African Americans is unconstitutional. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70–72 (1873); Strauder v. West Virginia, 100 U.S. 303 (1880), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975). Specifically, in regard to the meaning of the Fourteenth Amendment, the Court in *Strauder* stated that "[w]hat is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, . . . [and] that no discrimination shall be made against them by law because of their color?" *Strauder*, 100 U.S. at 307–08; *see also* Virginia v. Rives, 100 U.S. 313, 318 (1880), *overruled by* City of Greenwood v. Peacock, 384 U.S. 808 (1966) (establishing that Fourteenth Amendment's prohibitions apply to all actions of a state).

[3] *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Cumming v. County Bd. of Educ., 175 U.S. 528 (1899).

[4] 163 U.S. 537 (1895), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). Many people assume that the Supreme Court held in *Plessy* that separate but equal schools are constitutionally permissible under the Fourteenth Amendment. Unbeknownst to those who have never read the actual case, *Plessy* did not involve public education; instead, it was concerned with transportation. The concept of separate but equal schools was, instead, transformed from the holding and rationales in *Plessy*.

[5] *Id.* at 550–51; *see also* Brown v. Board of Educ., 347 U.S. 483, 488 (1954) [hereinafter Brown I] ("Under [the Plessy v. Ferguson] doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate."). In reality, however, the African-American schools were not provided with the same quality of facilities, books, materials, and other resources. *See, e.g.*, Gebhart v. Belton, 91 A.2d 137 (Del. 1952), *aff'd*, Brown v. Board of Educ., 349 U.S. 294

In 1954, the Supreme Court re-analyzed the "separate but equal" doctrine. In *Brown v. Board of Education*,[7] the Supreme Court rejected the application of the doctrine in the area of public education and held that segregation of children in the public schools solely on the basis of race denies African-American children the equal protection of the laws.[8] By denouncing school segregation, the Supreme Court declared the mere existence of a dual school system a violation of the Constitution. As a result, *Brown* established that public school districts have a constitutional duty to desegregate their public schools.[9]

In 1994, as race relations in the United States are supposedly "getting better," African Americans are still faced with the problem of collecting on the promises of *Brown*. Nearly forty years after that landmark decision, African Americans are witnessing the resurrection of the dual school system. Many school districts are becoming segregated once again, while numerous other school districts have remained segregated.[10]

How can this be? What about *Brown*? In 1954, the Supreme Court's opinion focused upon remedying the form of discrimination that existed in the

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(1955). In *Gebhart* the Supreme Court of Delaware followed the "separate but equal" doctrine but ordered that the African-American students be admitted to the white schools because of their superiority to the African-American schools. The inferiority of the African-American schools were based upon inferior teacher training, higher pupil-teacher ratios, inferior extracurricular activities, inferior facilities, and increased time and distance involved in traveling to and from school.

[6] A dual public school system exists where a single school system has schools for African-American children, who are taught by African-American school teachers, and schools for white children, who are taught by white school teachers.

[7] 347 U.S. 483 (1954).

[8] *Id.* at 495.

[9] In its sister case, the Supreme Court held that the desegregation of the school systems must be made with "all deliberate speed." Brown v. Board of Educ., 349 U.S. 294, 301 (1955) [hereinafter Brown II].

[10] *See* Eric S. Stein, Note, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2003-04 (1983); *see also* GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980 (1983) (indicating that the percentage of African-American children in predominantly African-American schools increased between 1978 and 1980); Gerald D. Suttles, *School Desegregation and the "National Community,"* SCHOOL DESEGREGATION RESEARCH 58 (J. Prager et al. eds., 1986) (noting that various school districts in the South have begun to resegregate). In a 1989 study, one author stated that "[s]egregation and differential treatment of blacks continue to be widespread in [public] schools." Stein, *supra* at 2004 (quoting COMMITTEE ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 379 (G. Jaynes & R. Williams eds., 1989).

South: "de jure" discrimination,[11] in which segregation was either mandated or permitted by state law. In 1994, however, African-American children are no longer the victims of de jure discrimination. Rather, they have become the victims of a new form of discrimination: "de facto" discrimination.[12] As a result, a new approach to desegregation had to be designed.

In *Swann v. Charlotte-Mecklenburg Board of Education*[13] and *Keyes v. School District No. 1*,[14] the Supreme Court established how to attack de facto segregation within the school system and receive a desegregation order. The new focus became proving intent.

Initially, desegregation orders were limited in scope to intradistrict remedies.[15] However, with the increase in white flight to the suburban areas during the 1960s and 70s, plaintiffs began to request that courts include these suburban areas in the desegregation remedy, that is, interdistrict remedies.

In 1974, the Supreme Court, in *Milliken v. Bradley*,[16] first addressed the issue of when federal courts have the equitable power to grant a desegregation order that is interdistrict in scope. Even though the Court established a two-part test to make such a determination, it has provided the lower courts with little guidance on how to interpret its opinion. As a result, lower courts have no design from which they can properly formulate evidentiary standards. Overall, the *Milliken v. Bradley* opinion may have effectively prevented inner city children from receiving the full benefits of their constitutional right to an equal education because it has "erected formidable barriers to interdistrict school desegregation relief."[17]

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[11] De jure discrimination occurs when the discrimination is required or permitted by state or federal law. *See supra* notes 4–9 and accompanying text. During the 1950s, 60s and 70s, it was easier to establish a claim of racial discrimination because it took place under the color of law. Since *Brown I*, 347 U.S. 483 (1954), held that such laws are unconstitutional, it has become more difficult for plaintiffs to state a claim.

[12] De facto discrimination is a form of discrimination that takes place by a governmental body without an express right to do so. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979). In other words, de facto discrimination represents all forms of discrimination that are not authorized or required by law. Today, most, if not all, forms of discrimination by governmental bodies are de facto discrimination.

[13] 402 U.S. 1 (1971).

[14] 413 U.S. 189 (1973).

[15] An intradistrict remedy is one limited to the school district which has committed the constitutional wrong.

[16] 418 U.S. 717 (1974).

[17] Robert R. Harding, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 YALE L.J. 340, 340 (1983).

This Comment attempts to establish a blueprint from which one can structure a case to overcome such barriers and (1) hold their school district liable for de facto segregation, that is, maintaining a dual school system, and (2) receive an interdistrict desegregation order in an attempt to completely eliminate the remaining "vestiges" of state-imposed discrimination in the public schools.

Part II of this Comment discusses *Milliken v. Bradley* and its limitations on the federal courts' scope of authority to structure equitable remedies. Part II also sets forth *Milliken's* two-part test to determine under what circumstances a federal district court has the authority to award an interdistrict desegregation order as a matter of law. Part III discusses each party's burden of proof and then sets forth the presumptions the federal courts utilize to balance the evidentiary burdens. Finally, Part IV discusses the various factors the courts have considered to satisfy the *Milliken* two-part test and suggests other factors, including housing discrimination, that arguably should be taken into account in the courts' analysis.

II. *MILLIKEN v. BRADLEY*: LIMITING THE SCOPE OF FEDERAL COURTS' AUTHORITY TO GRANT EQUITABLE REMEDIES

A. *From Intradistrict to Interdistrict Remedies—An Overview of* Bradley v. Milliken

Prior to 1954, the only remedy that the courts provided to African-American plaintiffs was essentially a monetary award, in the form of increases in operational funding, improvements to current facilities, more teachers, or new books.[18] However, in 1954, the Supreme Court expanded the types of remedies that a plaintiff could receive in school segregation cases. When the Supreme Court denounced the "separate but equal" doctrine in *Brown v. Board of Education*, desegregation (or integration) orders within a school system became a viable and somewhat effective equitable alternative.[19]

Intradistrict desegregation orders became the general rule after *Brown*.[20] However, in the 1970s, requests for interdistrict desegregation orders began to

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[18] The belief was that equal funding and equal facilities would be sufficient to provide equal educational opportunities, thus satisfying the Fourteenth Amendment's Equal Protection Clause. *See supra* notes 4–6.

[19] Brown I, 347 U.S. 483 (1954).

[20] *See, e.g.*, Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery

appear.[21] The courts began granting these interdistrict remedies believing that desegregation of inner city school districts, alone, would be insufficient to completely remove the vestiges of discrimination in the public schools.[22]

For example, in *Bradley v. Milliken*,[23] the court granted an interdistrict order to remedy desegregation within the Detroit public school system. After a forty-one day trial, the district court held that the state had violated the plaintiffs' Fourteenth Amendment rights on two grounds. First, the state acted to "impede, delay and minimize racial integration in Detroit schools" by enacting Act 48.[24] Second, the state provided suburban school districts (comprised of predominately white students) with state-supported transportation, yet failed to provide similar transportation funds for the students (primarily African Americans) within the Detroit city school district.[25]

County Bd. of Educ., 395 U.S. 225 (1969); Green v. County School Bd., 391 U.S. 430 (1968); Brown II, 349 U.S. 294 (1955).

[21] The typical interdistrict desegregation order will include an inner city school district, whose student population, especially in large metropolitan areas, is predominantly African American, and adjacent suburban school districts, whose student population is predominately white.

[22] *See, e.g.*, Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) (finding that an intradistrict remedy is not a sufficient remedy because it would result in an "all-black school system immediately surrounded by practically all white suburban school systems . . . .").

[23] 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

[24] *Bradley*, 338 F. Supp. at 589. Act 48, section 12 provided in pertinent part that "[t]he implementation of any attendance provisions for the 1970–71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provision of this amendatory act." Act of July 7, 1970, 1970 Mich. Pub. Acts 48 (Act 48). The district court believed that this first sentence of section 12 was designed to prevent the implementation of the April 7, 1970 desegregation plan originally adopted by the Detroit School Board. *Bradley*, 338 F. Supp. at 589. The district court also believed that the remainder of section 12 sought to prescribe for each school in the eight districts criteria of "free choice" (open enrollment) and "neighborhood schools" (nearest school acceptance priority) that "had as their purpose and effect the maintenance of segregation." *Id.*

[25] The district court also found that the state and local governments, along with private organizations such as lending institutions, real estate associations, and brokerage firms, established and maintained a pattern of residential segregation throughout the Detroit metropolitan area. *Id.* at 587. However, in its final analysis, the court did not place any emphasis on this fact. Instead, the court focused on constitutional violations of the Detroit Board of Education (holding the State vicariously liable), Milliken v. Bradley, 418 U.S. 717, 727 (1974), and constitutional violations of the State for (1) providing funds for the

The district court also found that the Detroit Board of Education violated the plaintiffs' Fourteenth Amendment rights by acting to essentially maintain a dual school system.[26] The wrongful acts committed by the board of education included: (1) creation and maintenance of optional attendance zones allowing white students to escape identifiably African-American schools,[27] (2) drawing attendance zones along north-south boundary lines despite awareness that drawing the boundary lines in an east-west direction would result in significantly greater desegregation,[28] (3) busing African-American students to predominately African-American schools past closer white schools with available space,[29] and (4) building a large majority of new schools in neighborhoods that were overwhelmingly composed of either African Americans or whites so that they would also become primarily one-race schools.[30]

To fashion the appropriate remedy, the district court ordered the Detroit Board of Education to submit desegregation plans for the problems existing within the city and then ordered the state to submit plans encompassing the entire three county metropolitan area, including eighty-five other school districts.[31] In a subsequent hearing, the district court concluded that the

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busing of white students in the suburban areas but not for the African-American students located in the inner city and (2) enacting Act 48. *Bradley*, 338 F. Supp. at 589.

[26] *Bradley*, 338 F. Supp. at 588.

[27] *Id.* at 587.

[28] *Id.* at 588. The court said that the "natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation." *Id.* According to the Board's drawing of attendance zones, no predominantly white residential area has ever been placed into a predominantly African-American school zone. In addition, every school that was 90% or more African American in 1960, and that was still in use in 1971, remained 90% or more African American. Finally, the percentage of Detroit's African-American students who attended schools that were 90% or more African American increased from 66% in 1960 to 75% in 1971. *Id.*

[29] *Id.*

[30] *Id.* at 589. In 1971, 14 new schools were opened up within the school district. Of these 14 schools, 11 opened were over 90% African American and one opened was over 90% white. Since 1959, the board has constructed at least 13 small primary schools with capacities from 300 to 400 students. The district court felt that this practice "negates opportunities to integrate, 'contains' the black population and perpetuates and compounds segregation." *Id.*

[31] Bradley v. Milliken, 345 F. Supp. 914, 920 (E.D. Mich. 1972), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). The eighty-five school districts that were to be included in the state's desegregation plans were not parties to the action and had not been found guilty of violating the plaintiff's Fourteenth Amendment rights.

Detroit-only plans were insufficient to accomplish desegregation in Detroit and ordered a metropolitan remedy.[32]

On appeal, the court of appeals accepted the district court's findings of fact and affirmed its conclusions of law. On the issue of the remedy, the court also agreed that a metropolitan plan was the proper remedy under the circumstances because "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems."[33] The court believed that the wrongful acts by the state could only be corrected by an interdistrict remedy.[34]

B. *Supreme Court's Two-Part Analysis of Interdistrict Remedies*

Prior to *Bradley v. Milliken*, no rules or guidelines existed to determine when an interdistrict, rather than an intradistrict, desegregation order would be proper.[35] In *Milliken v. Bradley*, however, the Supreme Court finally recognized the need to establish such rules and granted certiorari to determine the circumstances under which a federal court may grant an interdistrict desegregation order as a matter of law.[36]

To lay the groundwork for its analysis, the Supreme Court looked for guidance in its previous decision, *Swann v. Charlotte-Mecklenburg Board of Education*.[37] In *Swann*, the Court recognized that the controlling principle for

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[32] Milliken v. Bradley, 418 U.S. 717, 732 (1974). The district court disregarded the Detroit-only desegregation plans because it found that the best of the three plans submitted would result in an even greater number of African-American students and, thus, further encourage whites to abandon the city and the Detroit school system. *Id.*

[33] Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). The court of appeals also held that the record supported the district court's findings and conclusions regarding the constitutional violation committed by the school board, *id.* at 221–38, and by the state. *Id.* at 239–41.

[34] *Id.* at 249. The court of appeals did not address the issue of whether the outlying districts could be included in the desegregation plan without a finding of a violation of the plaintiffs' constitutional rights. Instead, the court merely held that all the suburban school districts which might be affected by any metropolitan-wide remedy should, under Federal Rule of Civil Procedure 19, be made parties to the case on remand and be given an opportunity to be heard regarding the scope and implementation of the remedy. *Id.* at 251–52.

[35] Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

[36] *Milliken*, 418 U.S. at 717. For an in-depth analysis of *Milliken*, see Nathaniel R. Jones, Milliken v. Bradley*:* Brown*'s Troubled Journey*, 61 FORDHAM L. REV. 49 (1992).

[37] 402 U.S. 1 (1971).

equitable relief is that the scope of the remedy should be determined by the nature and extent of the constitutional violation.[38]

With this principle as a base, the Supreme Court set forth its two-part test to determine when interdistrict remedies are proper as a matter of law. The Court held that before an interdistrict desegregation order can be granted as a matter of law, "it must first be shown that there has been a constitutional violation within one [school] district that produces a *significant segregative effect* in another [school] district."[39] The Court further opined that "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial* cause of interdistrict segregation."[40]

In its analysis of the case at hand, the Supreme Court accepted the district court's findings of fact[41] and its conclusion that both the Detroit Board of Education and the state had violated the students' right to a unitary school system. However, the Court held that, in light of its two-part test, granting an interdistrict desegregation order, under these facts, was impermissible as a matter of law.[42] In their opinion the second part of the test, significant

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[38] *Swann*, 402 U.S. at 16.

[39] *Milliken*, 418 U.S. at 744–45 (emphasis added). The Supreme Court expressed two factual situations in which it believed an interdistrict remedy would be proper: (1) when the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent school district; and (2) when the school district lines have been deliberately drawn by the state on the basis of race. *Id.* at 745.

[40] *Id.* at 745 (emphasis added). It is important to note that the Supreme Court does not require the suburban school district to have committed a constitutional violation to be included in the remedy. All that is required is that the school district be significantly affected. This lends credence to the argument that to hold a party liable in a school desegregation case, there does not have to be a direct correlation between the violation and the remedy. *See infra* notes 127–44 and accompanying text.

[41] Under Federal Rule of Civil Procedure 52(a), an appellate court may set aside the district court's findings of fact only if they are clearly erroneous. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 469–70 (1979) (Stewart, J., concurring) (emphasizing the importance of deference to the trial judge's findings of fact, especially in cases involving "the elimination of the more conspicuous forms of governmental ordained racial segregation").

[42] *See Milliken*, 418 U.S. at 747–52. The Supreme Court placed great emphasis on the importance of local control over public education in Michigan. Under Michigan law, the local authorities are provided with a large measure of control. Act of June 29, 1955 (School Code of 1955), MICH. COMP. LAWS § 340, *repealed by* School Code of 1976, Pub. Act 1976, No. 451, MICH. COMP. LAWS ANN. § 380 (West Supp. 1993–94). Under the facts of the case, the Court believed that an interdistrict remedy could "disrupt and alter the structure of public education in Michigan." *Milliken*, 418 U.S. at 742–43. The Court also noted that interdistrict desegregation orders, through the consolidation of numerous school

segregative effect, had not been satisfied. The Court reasoned that since the "[d]isparate treatment of white and [African-American] students occurred within the Detroit school system, and not elsewhere, . . . the remedy must be limited to that system."[43]

III. ALLOCATION OF THE BURDENS OF PROOF

Currently, there is no universal rule or set of rules which govern the allocation of the burden of proof in Fourteenth Amendment cases.[44] The Supreme Court has recognized that there are no "hard-and-fast standards governing the allocation of the burden of proof . . . ."[45] As a result of the lack of such standards, many courts seem to distribute the burdens of proof between the parties according to the principles of probability, public policy, and fairness.[46]

It is well-settled law that plaintiffs have the burden of proof regarding their cause of action. In the context of school desegregation actions today, it is the

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districts into one "super" school district, would provide logistical problems (as a result of large-scale busing) as well as financing and operating difficulties. *Id.* at 743.

[43] *Id.* at 746. The Court also stated that this intradistrict remedy was the correct remedy under the facts because it was designed, as all remedies should be, "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* According to the Supreme Court's reasoning, because African Americans would not have been going to suburban schools in the absence of the discrimination in Detroit, such children should not be granted the opportunity to go to such schools. On the contrary, it is impossible to determine what position the plaintiffs would have been in but for the wrong because their current position was caused by more than merely school segregation. Furthermore, the Court did not take into account the effect of state-imposed discrimination on residential patterns and school systems. It is a logical conclusion that the injured plaintiffs (African-American students) may have been distributed throughout the entire city (and even the suburbs) attending mixed race schools if their parents had been allowed to choose to live in such areas and to have high paying jobs like their white counterparts.

[44] Note, *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation*, 100 HARV. L. REV. 653, 657 (1987).

[45] Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 209 (1973).

[46] *Keyes*, 413 U.S. at 209 ("In the context of racial segregation in public education, the courts including this Court, have recognized a variety of situations in which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated."); Note, *supra* note 44, at 658. For a general overview on how the courts consider the principles of probability, public policy, and fairness in the allocation of the burden of proof, see JOHN W. STRONG, MCCORMICK ON EVIDENCE § 227 (4th ed. 1992) and JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2286-88 (J. Chadbourne rev. ed., 1961).

plaintiff's burden to prove the elements of de facto segregation, that is, segregative impact and intent. While plaintiffs have the burden of proving system-wide segregative intent, they are not required to prove such intent as to each and every student or public school within a system.[47]

To balance the burdens of proof, the Supreme Court in *Keyes v. School District No. 1*,[48] held that "where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system . . . ," it creates a presumption that other segregated schooling within the system is also intentional.[49] Otherwise stated, proof of intentional segregation in a substantial portion of the school system establishes "a prima facie case of unlawful segregative [intent] on the part of the school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."[50]

Once plaintiffs have established their prima facie case, school officials will not satisfy their burden of proof by merely articulating an "allegedly logical, racially neutral explanation for their actions."[51] Instead, they must produce evidence sufficient to support a finding that segregative intent was not among

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[47] *See Keyes*, 413 U.S. at 200 ("We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system.").

[48] 413 U.S. 189 (1973).

[49] *Id.* at 201. This presumption, with its corresponding shift in the burden of proof, is proper according to three principles. First, it is fair because the school officials are in the best position to articulate the actual factors taken into consideration in its decisions. Public policy also supports such a shift because it furthers the public interest in completely removing intentional discrimination and segregation from the public schools—with such a presumption, school authorities will be less likely to take segregative actions. Furthermore, the presumption is proper under the principle of probability because, in light of the segregative impact of such decisions, it is more likely than not that segregative intent was at least one factor upon which school officials made their decision.

[50] *Id.* at 208. In explaining why the school authorities have the burden of proof after the plaintiffs establish a prima facie case, the Court reasoned that "it is both *fair* and *reasonable* to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent." *Id.* at 209 (emphasis added). The Court also noted that, when intentional segregative actions in a substantial portion of the school system is proven, there exists a "high probability" that similar impermissible segregative considerations have motivated their actions in other areas of the system. *Id.* at 208. For a detailed analysis of the Keyes' presumption according to the principles of probability, fairness, and public policy, see Note, *supra* note 44, at 659–60.

[51] *Id.* at 210.

"any" of the factors that motivated their actions.[52] In many instances, this shift in the burden of proof may effectively prevent the school authorities from raising a defense. As a result, the presumption of system-wide segregative intent may constitute one of plaintiffs' most powerful evidentiary tools.[53]

In *Swann v. Charlotte-Mecklenburg*,[54] the Supreme Court established other presumptions in favor of the plaintiff. First, it held that, without taking into account any disparities in the student assignment, "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of the buildings and equipment, or the organization of sports activities, a *prima facie* case of segregative intent is shown."[55] The Fourth Circuit has extended this presumption by holding that, in a school system with a history of segregation, the discharge of a disproportionate number of African-American teachers incident to desegregation "thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence."[56]

Second, the Court stated that schools which are all or predominately of one race and are located in a district of mixed population require close scrutiny to determine whether the student attendance assignment has a segregative intent.[57] It made clear, though, that "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law."[58] However, the Court maintained that, in a system with a history of segregation, there is a presumption of a dual school system where the schools are substantially disproportionate in their racial composition.[59] Once this presumption arises and

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[52] *Id.* The Supreme Court has not left the school authorities without any defense. It stated that it might recognize a "natural boundaries" defense. However, the Court did not state that it would recognize the "natural boundaries" defense as a valid defense as a matter of law. *Id.* at 203 ("This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units."). This issue remains to be litigated.

[53] This is definitely an example of a rule of law that is rooted in public policy. While this rule of law is not a presumption to "intent," its role is just as important to the plaintiff. Unfortunately, this same rule of law does not carry over to other areas of racial discrimination law.

[54] 402 U.S. 1 (1971).

[55] *Id.* at 18.

[56] Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966) (en banc).

[57] Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 25-26 (1971).

[58] *Id.* at 26.

[59] *Id.*

the board has proposed a plan to convert the current system to a unitary school system, if the plan contemplates the continuation of some schools that are all or predominately of one race, the school authorities have the burden of proving that these new school assignments are "genuinely nondiscriminatory."[60]

In each case, the plaintiff's burden of proof will be difficult. Establishing a prima facie case will typically be the plaintiff's main obstacle. Although, subjective or objective intent may be difficult to prove, establishing a prima facie case has been made easier through the help of numerous presumptions which effectively shift the burden of proof onto the defendants, who have the knowledge to provide the court reasons for their decisions regarding the public schools.

IV. ESTABLISHMENT OF AN INTERDISTRICT DESEGREGATION ORDER—A NEW AND EXPANDED APPROACH

The Supreme Court, in *Green v. County School Board*,[61] held that school authorities have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch*."[62] This approach to desegregation is proper not only from a moral perspective, but also in light of the well-settled objective of remedies—to restore plaintiffs to the position they would have been in but for the injury.

In the year 1994, as courts are faced with requests for interdistrict desegregation orders and the application of the *Milliken* test, it is imperative that they analyze this two-part test in light of *Green's* objective to remove segregation "root and branch." When such an objective remains the focal point of the remedy, the conservative approach towards desegregation exemplified by cases of the Reagan-Bush era should begin to unfold and the courts should be provided with a legal mechanism to expand the circumstances under which contiguous school districts, which have been effectively exempted from liability

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[60] *Id.* The schools which would be predominantly one race after the plan would be closely scrutinized by the court. The actual burden on the school board would be to prove that the school's racial composition is not the result of present or past discriminatory action on their part. *Id.* This may not have played much importance, in 1970 (only 16 years after *Brown I*) because many people on the school board may have been on it during, or even before, 1954. This line of reasoning would have more importance, however, to a school board member today because it is highly unlikely that they were also board members during or prior to 1954 and *Brown I*.

[61] 391 U.S. 430 (1968). In *Green*, the Court dealt with the issue of whether a freedom-of-choice program was operated in fact to preserve a dual system.

[62] *Id.* at 437–38 (emphasis added).

under the conservative approach, can be included in the desegregation order. Only then can children who have become victims of the dual school system be compensated appropriately.

Under *Milliken v. Bradley*,[63] federal courts do not have the authority to grant an interdistrict desegregation order unless it determines two things have occurred: (1) a school district has violated its students' Fourteenth Amendment rights; and (2) this violation has had a significant segregative effect on another school district.[64] As a result, it is important to know what constitutes a constitutional violation and what constitutes a significant segregative effect.

A. *A Fourteenth Amendment Violation: Evidentiary Issues*

1. *The Current Analysis: Following the Basics*

In past racial discrimination cases, plaintiffs have attempted to establish a constitutional violation by introducing statistical evidence that a disproportionate number of African Americans have been adversely affected by a government act or policy.[65] The courts have generally responded that a showing of disproportionate impact on African Americans from government acts or policies, taken alone, is insufficient to establish a constitutional violation.[66] In fact, in *Washington v. Davis*,[67] the Supreme Court rejected such an approach and held that for a government act or policy that is neutral on its face to violate an individual's constitutional rights, that individual must prove

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[63] 418 U.S. 717 (1974).

[64] *See supra* notes 38–40 and accompanying text.

[65] These plaintiffs primarily based their arguments upon Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Yick Wo*, the Supreme Court used a disproportional impact analysis to hold that San Francisco ordinances which vested in the board of supervisors the discretion to grant or withhold their consent to the use of wooden buildings as laundries, even though neutral on their face, denied the plaintiff equal protection of the law and violated his Fourteenth Amendment rights. *Id.* at 368–70. The Court found disproportional impact because (1) Chinese owned and operated 240 of the 320 laundries with wooden buildings in the city, and (2) the board had denied the application of all Chinese with wooden buildings (approximately 200) who had applied for licenses, yet accepted many white owners with wooden buildings. *Id.* at 374.

[66] Washington v. Davis, 426 U.S. 229, 239 (1976) ("Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

[67] 426 U.S. 229 (1976).

that such act or policy had a racially discriminatory "purpose."[68] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[69] the Supreme Court further solidified this proposition by holding that plaintiffs, in racial discrimination cases, must prove some form of discriminatory intent for a constitutional violation to exist.[70]

This rule of law also applies to school desegregation cases.[71] In fact, the requirement of proving intent first arose in the school desegregation arena. In *Keyes v. School District No. 1*,[72] the Supreme Court ruled that, in school desegregation litigation, plaintiffs must prove that the defendant acted with an "intent" to segregate the school district for defendant's action to constitute a constitutional violation.[73] Numerical disproportions no longer will suffice.

After *Davis* and *Arlington Heights*, plaintiffs began to argue that discriminatory intent should be found where (1) there is a disparate racial impact from a government agent's actions and (2) such disparate racial impact

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[68] *Id.* at 239–45. In this case, the Supreme Court upheld the use of a police recruitment examination even though four times as many African-American applicants failed the examination than their white counterparts. Justice White, in his opinion, admitted that a racially disproportionate effect may be evidence of discriminatory intent, however, he limited it to only when the disproportionate effect is "very difficult to explain on non-racial grounds." *Id.* at 242. The Court's analysis is different in a Title VII action. Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved. Plaintiffs must only prove disproportionate impact to show a violation. *Id.* at 246–47.

[69] 429 U.S. 252 (1977).

[70] *Id.* at 264–71.

[71] *See, e.g.*, Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976) (holding that plaintiffs must establish that the adoption of student assignment policies by the school board, which had a segregative effect, was racially motivated); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). There has been some debate on whether the "intent" requirement in *Washington v. Davis*, 426 U.S. 229 (1976), should be extended into the area of school desegregation. *Compare* Martha M. McCarthy, *Is a New Standard on Discrimination Emerging?*, 8 J.L. & EDUC. 315, 319 (1978) ("The Supreme Court's posture in desegregation litigation cannot be divorced from its stance in addressing all types of discrimination.") *with* Harold J. Sullivan, *The Intent Requirement in Desegregation Cases: The Inapplicability of* Washington v. Davis, 10 J.L. & EDUC. 325, 332 ("Despite the Supreme Court's reliance on *Washington* in school desegregation cases following 1976, thus making a finding of intent a requirement in school desegregation cases, the same standard should not be applied in school desegregation as in racially disproportionate impact cases.").

[72] 413 U.S. 189 (1973). In *Keyes*, the Supreme Court first confronted the issue of school desegregation when a racial imbalance existed in a northern school system with no history of statutorily authorized school desegregation, that is, de facto segregation.

[73] *Id.* at 198, 208–10.

was a foreseeable consequence of the action.[74] In *Columbus Board of Education v. Penick*,[75] plaintiffs raised this argument to show that the city school board had violated their constitutional rights. The Supreme Court rejected this argument as well and stated that under the trilogy of *Keyes*, *Davis*, and *Arlington Heights*, "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation."[76] However, the Court opined that these two factors are relevant evidence in proving discriminatory purpose.[77] Nevertheless, it still failed to articulate how segregative intent could be proven.

Segregative "intent" is undoubtedly the primary obstacle for plaintiffs in school desegregation cases. Proving intent in 1994 will be especially difficult because most school officials do not and will not openly express that the purpose of their actions is to resegregate the school system.[78] Furthermore, in light of the ease in holding school officials liable for overt discriminatory actions after *Brown v. Board of Education*, today's school officials are more likely to "mask" their discriminatory intent than school officials did in the past.[79]

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[74] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[75] 443 U.S. 449 (1979).

[76] *Id.* at 464.

[77] *Id.* In a school desegregation action the Court held that "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" *Id.* at 465 (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 255 (S.D. Ohio 1977), *aff'd in part*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)).

[78] Thomas M. Dee & Norella V. Huggins, *Models for Proving Liability of School and Housing Officials in School Desegregation Cases*, 23 URB. L. ANNUAL 111, 117–18 (1982); *see also* United States v. Board of Sch. Comm'rs, 573 F.2d 400, 412 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part*, *vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) ("[I]n an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find."); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 686 (1985) ("Both at the individual and institutional levels, racism is typically far more subtle, indirect, and ostensibly nonracial now than it was in 1964, during the full swing of the Civil Rights Movement. Consequently, detection and remedy have become more difficult.").

[79] Today, government actors, including school board members, disguise their discriminatory intent by avoiding the creation of a paper trail. *Id.* Some may argue that discriminatory motives no longer exist in the decisionmaking by local school boards. However, Stein stated it correctly when he said that, in light of the recent increase in racial incidents across the country, "[i]t is unlikely that school boards, which reflect the values of the community, would not also mirror this prejudice." Stein, *supra* note 10, at 2005.

Unfortunately for plaintiffs, the Supreme Court has left them with little guidance as to what "intent" actually means. No test has been established to remove this uncertainty. In fact, the Supreme Court has openly expressed its reluctance to define exactly what constitutes intent, that is, the types and amount of state conduct that establish a Fourteenth Amendment violation. When faced with the issue of the necessary level of action for injunctive relief, Justice Douglas in *Keyes* wrote that "the necessary degree of state involvement is incapable of precise definition."[80] In light of this belief, the Court held that a determination of discriminatory intent must be analyzed on a "case-by-case basis."[81] As a result, there are no per se answers to the questions of what, and how much, is required to establish a constitutional violation.[82]

Although much has been left unanswered regarding discriminatory intent, one thing is clear: plaintiffs are not required to prove subjective discriminatory intent. *Keyes*, *Davis*, and *Arlington Heights* required proof of discriminatory intent, however, they did not require direct proof of "subjective" intent. Recognizing the difficulty in discovering direct evidence of discriminatory intent and the impossibility of a school board confessing to charges of discrimination, the courts have chosen, instead, to analyze school desegregation cases according to an "objective" standard.[83]

Under an "objective" standard, the courts analyze the various acts of the school board, the state board of education, and the state legislature and infer discriminatory intent from the "totality of the relevant facts,"[84] including both direct and circumstantial evidence.[85] The courts justify their authority to infer

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[80] Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 215 (1973) (Douglas, J., concurring).

[81] To justify its reluctance to establish what types and how much state conduct are necessary for a constitutional violation, the Court compared the task to the similar difficulty with determining the amorphous concepts of due care, causation, preponderance of the evidence, and beyond a reasonable doubt.

[82] *Board of Sch. Comm'rs*, 573 F.2d at 400 ("*Arlington Heights*, while amplifying the intent requirement set forth in *Davis*, did not answer the crucial question of what type of intent a plaintiff must show in order to make out a prima facie case under the Equal Protection Clause. In short, *Arlington Heights* instructed lower courts where to look for the required intent without defining its imminent nature.").

[83] Joseph A. Sullivan, *Equal Protection in the Post-Milliken Era: The Future of Interdistrict Remedies in Desegregating Public Schools*, 18 COLUM. HUM. RTS. L. REV. 137, 163 (1986); *see* Washington v. Davis, 426 U.S. 229, 253 (1976) ("Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.").

[84] Sullivan, *supra* note 83, at 163.

[85] *E.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (asking for a "sensitive inquiry into such circumstantial and direct evidence

such intent from circumstantial evidence upon the ideology that "the actor is presumed to have intended the natural consequences of his deeds."[86]

Arlington Heights has set forth a number of factors which are relevant in determining whether segregative intent can be inferred from an act. They include:

> (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; (4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and (5) the legislative or administrative history of a decision.[87]

With these factors in mind, the courts may analyze, independent of each other, the acts of the local school board, the state board of education, and the state legislature to determine whether each acted with individual discriminatory intent or acted with group intent to further segregate inner city public schools.

a. *Local School Board as a Defendant*

The primary focus of the courts' analyses in school desegregation cases has been on the local school board. Primarily, courts have focused on local school boards because a local school board has a wider array of actions and polices from which the courts are able to infer discriminatory intent. As a result, this subsection discusses the various indicia that the courts focus upon to establish a Fourteenth Amendment violation.

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of intent as may be available"). In *Brown v. Artery Org.*, 654 F. Supp. 1106, 1117 n.26 (D.D.C. 1987), the court stated that

> [i]n this day and age, when racial discrimination is no longer fashionable as it was a generation or two ago [and] . . . it is now much more difficult to provide direct or conclusive proof of discriminatory intent . . . [t]he law would be as blind as the mythical figure of justice if it did not take account of that reality, rejecting the use of circumstantial evidence of intent.

Id.

[86] United States v. Board of Sch. Comm'rs, 637 F.2d 1101, 1105 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[87] *Arlington Heights*, 429 U.S. at 267–68.

The racial composition of a school's student population is probably the most important and influential indicia of intent.[88] However, statistical evidence of racial imbalances alone is insufficient to permit a finding of unconstitutional segregation.[89] The courts have not established any numerical guidelines to determine what is, per se, a segregated school. However, a substantial degree of importance has been placed upon the percentage of African-American students attending predominately or all African-American schools.[90] Many courts have used an eighty percent threshhold, that is, how many African-American students go to a school which has a racial composition of eighty percent or more African Americans, as an indicator of segregative intent. As a result, plaintiffs should initially focus on obtaining evidence of the racial makeup of the student populations at each level of the public school system.

Other indicia of segregative intent which have a close correlation to the racial makeup of the student population are student assignment plans. Even though neutral on their face, optional attendance zones may violate the students' constitutional rights.[91] Optional attendance zones are not

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[88] While the makeup of the student population is indicia of a segregated school system, pupil reassignments alone do not automatically remedy the past segregative acts. Milliken v. Bradley, 433 U.S. 267, 287 (1977).

[89] Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 240 (S.D. Ohio 1977), *aff'd in part*, 583 F.2d 787 (6th Cir 1978), *aff'd*, 443 U.S. 449 (1979).

[90] *See* Brinkman v. Gilligan, 446 F. Supp. 1232 (S.D. Ohio 1977), *rev'd*, 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom.* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (51 of 69 schools within the school system were at least 90% white or 90% black); *Penick*, 429 F. Supp. at 229 (At the time this case was decided 70.4% of all students in Columbus Public Schools attended schools that were 80–100% populated by either African-American or white students. One-half of the 172 schools were 90% African American or 90% white when African Americans only constituted 32% of the school system's population.); United States v. Board of Sch. Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 423 U.S. 920 (1973) (School numbers 1, 60, 66, 69, 71, 76 and 110 were over 80% African American.).

[91] The courts are most likely to make such a finding in two situations: (1) when the optional attendance zones allow white students to bypass "African-American" schools, which are closer in proximity, to go to a "white" school; and (2) when the optional attendance zone only encompasses an area that the school board knows is undergoing a racial transition such that it allows the white children in the area to choose the "white" school and the African-American children to choose the "African-American" school. *See, e.g.*, Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) (Detroit School Board created and maintained optional attendance zones within Detroit neighborhoods undergoing racial transitions and between high school attendance areas of opposite predominant racial compositions.); *Penick*, 429 F. Supp. at 244–45 (In times of residential racial transition, the board created optional attendance zones "to allow white students to avoid predominantly black schools,"

unconstitutional per se, but they receive a high level of scrutiny when they allow white students to bypass closer "African-American"[92] schools and attend "white" schools.[93] Likewise, the courts have recognized that busing African Americans past predominately white schools to attend predominately African-American schools, and vice-versa, may constitute a Fourteenth Amendment violation.[94] At least one court has declared that even "freedom of choice"[95] and "neighborhood school"[96] attendance policies may be unconstitutional notwithstanding the fact that they are neutral on their faces.

Indicia of segregative intent can also be found through other statistical figures and board actions. For example, the courts have utilized the percentage of African-American teachers assigned to predominately African-American schools, in contrast to the number in predominately white schools, to bolster its finding of intent.[97] The courts have also closely analyzed the location of new

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which were often closer to the homes of the white pupils and where the court could not perceive a racially neutral purpose of the optional zones.).

[92] By "African-American" school, I am referring to schools with a population of at least 75% African Americans. In the inner city, it is not uncommon for some schools to be 90% or more African American in racial makeup. *See Bradley*, 338 F. Supp. at 582; *Penick*, 429 F. Supp. at 229.

[93] By "white" school, I am referring to a school in which the racial makeup of the student population is at least 75% white.

[94] *See Bradley*, 338 F. Supp. at 582 (finding Fourteenth Amendment violation when African-American children were bused past white schools to attend African-American schools and white children were not bused to attend an African-American school).

[95] *See* Green v. County Sch. Bd., 391 U.S. 430 (1968) (holding, in light of the school board's affirmative duty to remove segregation from the school system, that its freedom of choice attendance formula was unconstitutional because it produced negligible integration; no whites had chosen to attend the African-American school that 85% of the African Americans attended).

[96] *See* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

[97] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (A constitutional violation was found because the school board had a general practice of assigning African-American teachers only to schools with predominantly or all African-American students. In the 1972–73 school year, 250 African-American elementary teachers (63% of all African-American elementary teachers) were assigned to schools with at least 80% African-American populations, while the schools with at least 80% white populations had no African-American teachers assigned to them.); Morrilton Sch. Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979), *cert. dismissed*, 444 U.S. 1050, *and cert. denied*, 444 U.S. 1071 (1980) (Along with other actions, the racial composition of the faculty within Conway county was sufficient to establish a Fourteenth Amendment violation: two of the all-white school districts had no African-American teachers, one of the all-white school districts only had one African-American teacher, and the all-African-American school district had only one white teacher.).

school construction sites,[98] the method of drawing school attendance zones,[99] and the amount of subsidies applied towards the transportation of students to outlying private and parochial schools.[100]

The courts have not limited their analysis of intent to merely affirmative actions by the school board. A school board may also be held to have violated students' constitutional rights as a result of its inaction.[101] Such a finding is most likely to result when the school board has been put on notice that either the board's current decision will increase the racial imbalance in the school system, and the board fails to reverse its decision, or that a recommendation will eliminate or lessen the current segregation, and the board refuses to implement that recommendation.

In *Columbus Board of Education v. Penick*,[102] the Supreme Court imposed liability on a school board for its inaction. The Court affirmed the district court's conclusion that the Columbus School Board violated the Fourteenth Amendment's Equal Protection Clause by failing to act upon various recommendations of community groups, recommendations which, if implemented, would have decreased the level of segregation within the school system.[103] The school board's inaction included (1) failing to implement recommendations of the University Commission of 1968 to encourage integrated residential patterns, (2) refusing to create a site-selection advisory group to assist in avoiding construction sites with a segregative effect, (3) refusing to ask state education officials to present plans for desegregating the Columbus public schools, and (4) refusing to apply for federal desegregation-assistance funds.[104] While the Court did not expressly state such, it may be inferred from the opinion that school boards have a duty to implement plans and recommendations which would have the effect of lessening the racial disparities within the school system; failure to do so, in the absence of valid

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[98] *See supra* note 30 and accompanying text.

[99] *See supra* notes 27–28 and accompanying text.

[100] *See, e.g.*, Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975) (finding violation of Constitution because State subsidized interdistrict transportation of white inner city children to the suburban private and parochial schools, which were approximately 94% white).

[101] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[102] 443 U.S. 449 (1979).

[103] *Id.* at 463 n.12.

[104] *Id.* The district court drew "the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." *Id.* (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp 229, 240 (S.D. Ohio 1977), *aff'd in part*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

race-neutral rationale, legitimizes a finding of segregative intent and should result in liability.

b. *State Board of Education and State Legislature as Defendants*

Besides analyzing the acts, policies, and practices of the local school board, the courts also scrutinize the actions of the state board of education and the state legislature itself. While the number of their acts which may constitute constitutional violations may not come close to those of a school board, such acts may be of greater weight and importance. In fact, in many instances, the actions or inactions of these defendants alone may be sufficient to establish a prima facie case and justify an interdistrict award.[105]

The state board of education has the responsibility of overseeing the provision of public education. One of its primary responsibilities is to create and maintain the various school district lines. The state board may violate the Fourteenth Amendment if it fails to perform its responsibility in accordance with the Constitution. Whether creating or adjusting school district lines or consolidating smaller school districts into "mega" districts, the state board of education will violate its students' Fourteenth Amendment rights if it creates or adjusts a district on a racial basis and it results in an increased segregative effect.[106]

Even though the state legislature, in theory, does not have any direct authority over the provision of public education, it still may be found guilty of violating students' Fourteenth Amendment rights. The courts have held that the repeal of legislation which negatively affects the ability to desegregate the school systems may establish a Fourteenth Amendment violation. The primary avenue to hold the state legislature liable is to look at the legislation's statutory history along with the timing of its enactment or repeal.

The prime examples of legislation from which segregative intent can be inferred are state and local annexation laws. Until 1954, many states had legislation which either permitted city school districts to annex any land which the city had annexed for governmental purposes or provided that the territory automatically became a part of the city school district upon its annexation by

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[105] *See infra* notes 111–12.

[106] *See, e.g.*, Morrilton Sch. Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979), *cert. dismissed*, 444 U.S. 1050, *and cert. denied*, 444 U.S. 1071 (1980) (A finding of purposeful segregation of the consolidated school districts of Conway County, Arkansas, was warranted, although the laws allowing the consolidation were racially neutral on their face, because the state board's pattern of consolidation showed that various white school districts, which should have been consolidated with neighboring African-American school districts, were being consolidated with other white school districts.).

the city government.[107] However, as a direct response to *Brown v. Board of Education*,[108] various states either repealed their statutes entirely[109] or amended them to remove the automatic annexation provisions.[110]

Were such actions discriminatorily motivated? The mere fact that the legislature enacted or repealed annexation statutes soon after the *Brown* decision should raise a presumption that such action was discriminatorily motivated. The state will undoubtedly express that they had a race-neutral purpose for enacting or repealing. What nondiscriminatory purpose would the state have? Even if such a purpose was given, a question still arises concerning the timing. Why didn't the enactment, repeal or amendment occur, for example, during the 1920s or 30s instead of immediately after *Brown*? Considering the degree of racism which permeated the United States during the 1950s and 1960s, the continued struggle of many whites to resist integration of the public schools, and the timing of the legislative action, it seems more likely than not that such actions were made with a segregative intent. As a result, under the principle of probability, annexation statutes which were enacted, repealed or amended soon after the *Brown* decision should raise a presumption of discriminatory intent. When such a presumption arises, the burden should then shift to the legislature to produce a race-neutral basis for its decisionmaking.

In *United States v. Board of School Commissioners*, the Seventh Circuit was faced with this very issue. After examining the history of the Indianapolis public school system, the appellate court held that the Indiana legislature's enactment of the "Uni-Gov" legislation,[111] which expanded the city boundaries

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[107] *See, e.g.*, OHIO REV. CODE ANN. § 3311.06 (C)(1)-(2) (Anderson Supp. 1993); Act March 8, 1961, ch. 186, § 9, 1961 Ind. Acts 431, 439–42, *repealed by* Act of February 25, 1969, ch. 52, § 2, 1969 Ind. Acts 57.

[108] 347 U.S. 483 (1954).

[109] *See, e.g.*, United States v. Board of Sch. Comm'rs, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[110] *See, e.g., In re* Proposed Annexation by Columbus City Sch. Dist., 341 N.E.2d 589, 591 (Ohio 1976). After the 1955 amendment of O.R.C. § 3311.06, the land annexed by the city is no longer automatically annexed to the city school system. The city school system currently must apply for annexation from the state school board. With the increased resistance from the outlying suburban areas, the Columbus city school system has not been able to expand with the city itself.

[111] Act of March 13, 1969, ch. 173, § 101, 1969 Ind. Acts 357 (codified as IND. CODE §§ 18-4-1-1 to 18-4-1-4 (1976)). The "Uni-Gov" legislation is officially titled "Consolidated First-Class Cities and Counties Act." *Board of Sch. Comm'rs*, 637 F.2d at 1107. Under the legislation, the city of Indianapolis established a county-wide governmental structure run by a new governmental unit known as the "City of Indianapolis," which included all of Marion County. *Id.* All the residents of the new city now voted in the

to the county line, violated the Fourteenth Amendment. The Uni-Gov legislation repealed a 1961 act which permitted the Indianapolis public school system to annex any land that the city had annexed for governmental purposes.[112] The court reasoned that the Uni-Gov legislation repealed the 1961 act with the racially discriminatory intent and purpose of confining African-American students in the Indianapolis public schools to the 1969 boundaries of the system, and thereby perpetuated the segregated white schools in the adjacent suburban Marion County.[113] As a result, this opinion lays further foundation for the proposition that legislation which either prevents automatic annexation or effectively prohibits the inner city school districts from annexing suburban areas already annexed by the city, should establish a rebuttable presumption of discriminatory intent, that is, a prima facie case for a Fourteenth Amendment violation.

c. *How Many Acts Are Required for a Constitutional Violation?*

In addition to the uncertainty about what does and does not constitute intent, the lower federal courts have been given little guidance as to the number of acts necessary to constitute a Fourteenth Amendment violation. The Supreme Court has failed to establish a bright line test to determine how many acts are required to establish intent and create a right to relief. The question remains whether a single act is sufficient to constitute a Fourteenth Amendment violation.

Theoretically, a single action by a government defendant may be sufficient to establish a constitutional violation. Under *Green v. County School Board*, each school district has an affirmative duty to "take whatever steps might be necessary to convert to a unitary system."[114] The Supreme Court, in *Columbus Board of Education v. Penick*, further established that "[e]ach instance of a

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election for mayor and members of the new City Council. *Id.* Under the Uni-Gov legislation, the new City Council had authority over nearly every governmental area except school education. As a result, the Uni-Gov legislation had intentionally repealed a 1961 act which allowed the school district to annex land which had been civilly annexed to the city. *Id.* at 1107–08; *see* Act of March 8, 1961, ch. 186, § 9, 1961 Ind. Acts 431, 439–42, *repealed by*, Act of February 25, 1969, ch. 52, § 2, 1969 Ind. Acts 57 (codified as IND. CODE § 20-3-14-11 (1976)). The court believed that the state legislature repealed the 1961 Act with a discriminatory purpose because it knew that the suburban areas would oppose the consolidation of its school systems with the inner city school system, thus encouraging the segregation of the school systems. *Board of Sch. Comm'rs.*, 637 F.2d at 1108.

[112] *Board of Sch. Comm'rs.*, 637 F.2d at 1108.

[113] *Id.*

[114] Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968).

failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment."[115] From this language, it follows that once plaintiffs have established that the school board has a duty to desegregate the school system, any action by the school board that is intended to, and actually does, further segregate the school system may provide a sufficient basis to establish a constitutional violation and require a desegregation order.

Milliken v. Bradley may provide additional support for this approach. While discussing the controlling principle in granting injunctive relief, the Supreme Court intimated that a Fourteenth Amendment violation "might" be found where the school district lines have been drawn on the basis of race in a way as to maximize its segregative effect.[116] Such language suggests that only one act is necessary to establish a constitutional violation. However, the degree of reliance on this proposition is unclear because it is merely dicta rather than a conclusion as a matter of law.

The Seventh Circuit's decision in *United States v. Board of School Commissioners* lends further support to the single-action theory. In this Indianapolis case, the court held that the enactment of a series of state legislation, in addition to Uni-Gov, had a segregative effect which was significant enough to justify an interdistrict desegregation order.[117] As a corollary, the mere enactment or repeal of legislation that intentionally segregates the school systems should, in and of itself, be sufficient to establish a prima facie case of a Fourteenth Amendment violation. It is a natural consequence that when a single act is sufficient to justify an interdistrict remedy, that same act is also sufficient, in and of itself, to establish a prima facie case of a constitutional violation.

In reality, it is doubtful that the Supreme Court will allow such an expansion of the Fourteenth Amendment. In light of the current Court's conservative approach in interpreting the Constitution, it is more likely to require a series of actions to establish a constitutional violation. In fact, to date, each Supreme Court desegregation case has involved a series of actions by the local school board,[118] some in connection with actions by the state board of

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[115] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979).

[116] Milliken v. Bradley, 418 U.S. 717, 745 (1974) ("[A]n interdistrict remedy might be in order where . . . district lines have been deliberately drawn on the basis of race. In such [a] circumstance[] an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.").

[117] United States v. Bd. of Comm'rs, 573 F.2d 400, 408 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[118] *See, e.g.*, Missouri v. Jenkins, 491 U.S. 274 (1989); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979);

education, others in addition to actions by the state legislature.[119] As a result, plaintiffs should be prepared to introduce evidence of multiple segregative actions by the defendants.

2. *Housing Discrimination—Its Inclusion into the Elite Group of Admissible Evidence*

In *Milliken v. Bradley*, the Supreme Court's majority opinion left open for debate whether the federal courts may rely on evidence of housing discrimination to infer discriminatory intent and to establish a Fourteenth Amendment violation.[120] In his concurring opinion, though, Justice Stewart, suggested that intentional government housing violations may be sufficient to segregative intent and to justify a school desegregation order.[121] As a result, legal scholars are divided as to the importance of Stewart's dictum[122] and the courts are uncertain as to the relevance of such evidence.

Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Green v. County Sch. Bd., 391 U.S. 430 (1968); School Bd. v. Baliles, 829 F.2d 1308 (4th Cir. 1987); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); Bell v. Board of Educ., 683 F.2d 963 (6th Cir. 1982); United States v. Board of Sch. Comm'rs, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985 (N.D. Ohio 1978), *aff'd*, 675 F.2d 787 (6th Cir. 1982).

[119] *See, e.g.*, *Milliken*, 418 U.S. 717; *Board of Sch. Comm'rs*, 637 F.2d 1101.

[120] *Milliken*, 418 U.S. 717. The district court had found housing violations by state officials and, partially based upon such finding, concluded that the students' constitutional rights had been violated. Bradley v. Milliken, 338 F. Supp. 582, 586–87 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). In affirming the district court's judgment, the court of appeals stated that "we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." Bradley v. Milliken, 484 F.2d 215, 242 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). In light of this fact, the majority of the Supreme Court stated that "[a]ccordingly, in its present posture, the case does not present any question concerning possible state housing violations." *Milliken*, 418 U.S. at 728 n.7.

[121] *Milliken*, 418 U.S. at 755 (Stewart, J., concurring) ("Were it to be shown . . . that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws, . . . transfer of pupils across district lines or . . . restructuring of district lines might well be appropriate.").

[122] Harding, *supra* note 17, at 342–43 ("Though some believe that Justice Stewart's words might provide an independent basis for relief, others take the suggestion as merely an 'offhand remark.'").

Various authors[123] have suggested and many courts[124] have acknowledged that a close interrelationship exists between residential housing practices and the racial makeup of the city schools. In many instances, discriminatory residential housing practices may be the primary cause in further segregation of a school system. Likewise, placement of schools in areas of predominately one race may be the primary cause of residential segregation by others, the purpose of which is to promote and maintain one-race schools. Even though "school and housing desegregation law have evolved along separate lines,"[125] the two legal concepts may be merged to hold school officials responsible for remedying housing discrimination through school desegregation orders.[126]

School officials will undoubtedly argue that they should not be delegated the responsibility for remedying private residential discrimination or even discriminatory practices by other government agencies because there is no

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[123] *See* Harding, *supra* note 17, at 340 ("Official housing discrimination should serve as a basis for metropolitan school desegregation remedies even if plaintiffs offer no proof of discrimination by school officials."); Karl E. Taeuber, *Demographic Perspectives on Housing and School Desegregation*, 21 WAYNE L. REV. 833, 842–43 (1975) (noting racial composition of a school's student body may act as a signal to realtors and homebuyers because school attendance lines are an important factor in residential real estate). *But see* Eleanor P. Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 66 (1977) (indicating a lack of sufficient evidence to conclude that the racial composition of the schools has an effect upon residential patterns in the community).

[124] *See, e.g.*, Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 202 (1973) (designating schools as one-race schools may have a profound reciprocal effect upon the racial compositions of residential neighborhoods within the city); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20–21 (1971) ("The location of schools may thus influence the patterns of residential development of a metropolitan area and have [an] important impact on [the] composition of inner-city neighborhoods."); Adams v. United States, 620 F.2d 1277, 1291 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980) (noting that the public perception of a school's racial identity is an influential factor in shaping community residential patterns); United States v. Board of Sch. Comm'rs, 573 F.2d 400, 408 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) ("It is generally agreed that racial residential patterns are reflected in the student composition of an area's public schools and that racial segregation in public schools and racial segregation in housing are integrally interrelated.").

[125] Dee & Huggins, *supra* note 78, at 112–13.

[126] *See generally*, Dee & Huggins, *supra* note 78 (analyzing five liability models that appear in school desegregation cases from which a school board can be held liable to remedy housing discrimination through a desegregation order).

correlation between the constitutional violation and the remedy.[127] Accordingly, school officials will suggest that they should be held responsible only for remedying segregation in the school system which is a direct result of their intentional discriminatory acts. However, language in *Milliken* suggests otherwise[128] and supports this housing approach to liability.

Plaintiffs cannot rely on the theories of agency or vicarious liability to hold a school district liable for discriminatory acts of real estate agents. In *Milliken*, plaintiffs relied on these theories to assert that the state school board was responsible and liable for the constitutional violations of the Detroit school board. Because acceptance of these theories of liability would justify a statewide remedy, thereby violating the rule of equity that a remedy cannot exceed the extent of the violation, the Supreme Court rejected these theories of liability.[129] Plaintiffs, however, may still be able to require local school boards to remedy housing discrimination under either the "single-sovereign assumption"[130] theory or the tort "concert of action" theory.

Under the single-sovereign assumption theory, when an arm of the state stands accused of a constitutional violation, the state itself also stands accused.[131] In other words, the state cannot escape liability by simply

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[127] Under Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the scope of the remedy is determined by the nature of the constitutional violation. As a result, there must be some nexus between the equitable remedy and the violation.

[128] *Milliken* recognized that an "innocent" suburban school district, one which has not committed a constitutional violation, may be held partially responsible for remedying intentional segregation in the city school district. Milliken v. Bradley, 418 U.S. 717, 745 (1974). In this situation, the suburban school district is held liable for the discriminatory acts of another school district, even though there is no nexus between the violation and the remedy, because they are both agents of the education branch of the state government. This same rationale is sufficient to hold a school district partially responsible for remedying residential discrimination which has an effect on the school district's racial composition because the school district and the constitutional violators are both agents of the state government. As a result, *Milliken* itself provides great support for the housing approach to hold school districts liable. *See* Harding, *supra* note 17, at 344–45.

[129] *Milliken*, 418 U.S. at 738, 744–46.

[130] The courts have already applied the "single-sovereign assumption" theory in parallel actions to hold that the constitution protects other rights, besides equal education, from state action. *See, e.g.*, Waller v. Florida, 397 U.S. 387, 394 (1970) (evoking single-sovereign assumption to protect defendant's constitutional right against double-jeopardy by barring prosecution in state court after prosecution in municipal court because both are arms of the same government); Gaston County v. United States, 395 U.S. 285, 293, 296–97 (1969) (using single-sovereign assumption to strike down an otherwise valid and neutrally administered literacy test for voter registration to remedy the wrongs of the dual school system).

[131] Harding, *supra* note 17, at 346.

fragmenting responsibility among its various branches.[132] Because the state is ultimately responsible for the acts of its government agents, including constitutional violations, the courts should be able to utilize any of the state government's branches that have the capability and resources to remedy the wrong and place the injured party in the position they would have been in but for the wrong.

Under the single-sovereign assumption theory, in the context of housing discrimination, the court should have the authority to hold the state partially responsible for remedying residential segregation caused by housing officials through any means available to it. Because the local school board is an agent of the state, and the state is liable for the wrong, the court should have the discretion to require this agent to help, through school desegregation orders, implement a remedy designed to remove the effects of the housing discrimination "root and branch."

The use of the single-sovereign assumption theory is not a novel idea in the area of school desegregation. The Supreme Court, in fact, has already applied the concept to resolve disputes in recent years. For example, in *Cooper v. Aaron*,[133] the Court relied upon the single-sovereign assumption theory to prevent the Little Rock school board from delaying the desegregation of the school district. The local school board had claimed it was delaying the desegregation of their schools because the governor and the state legislature were preventing the implementation of court-ordered desegregation plans.[134] The Court rejected the argument, however, and held that for equal protection purposes a local school board is an arm of the state, and that when it violates the Fourteenth Amendment, the state itself also violates the Fourteenth Amendment.[135]

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[132] *See* United States v. Board of Sch. Comm'rs, 573 F.2d 400, 410 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) ("The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents."); Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 183 (W.D. Mich. 1973), *aff'd sub nom.* Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (indicating state "should not be allowed to escape constitutional responsibility by fractionalizing its jurisdiction through many agencies"); United States v. Missouri, 363 F. Supp. 739, 748 (E.D. Mo. 1973) (A state "cannot escape responsibility for the racial discrimination disclosed in this case or the obligation to correct the effects of such discrimination by neatly compartmentalizing the authority and responsibility of its various instrumentalities. . . .").

[133] 358 U.S. 1 (1958).

[134] *Id.* at 15–17.

[135] In support of its position, the court reasoned as follows:

The Seventh Circuit Court of Appeals has also recognized the single-sovereign assumption theory. In *United States v. Board of School Commissioners*,[136] the city's racial composition was similar to that of most large metropolitan areas: 98.5% of the African Americans in Marion County lived in the "old" city, the area served by the Indianapolis public schools (the inner city public school system), while the majority of the whites lived in the outlying suburban areas. This racial division in residential areas was clearly reflected in the Indianapolis public school system.[137] After accepting the district court's findings of residential segregation,[138] the court held that the "innocent" suburban school districts may be held partially responsible for remedying these wrongs.[139] In response to the suburban school districts'

> The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. . . . "The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Cooper, 358 U.S. at 16–17 (quoting *Ex parte* Virginia, 100 U.S. 339, 347 (1880)).

[136] 573 F.2d 400 (7th Cir.), *on remand*, 436 F. Supp. 183 (S.D. Ind 1978), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert.denied*, 449 U.S. 338 (1980).

[137] During the 1968–69 academic year, 96.8% of all African-American students within Marion County attended schools served by Indianapolis public schools. *Id.* at 408. In the 1976–77 school year, African Americans accounted for less than 2% of the school population in 7 of the 10 suburban Marion County districts. *Id.* Indianapolis public schools, 1 of 11 school districts in Marion County, serviced 52% of all students in Marion County public schools, but over 90% of the African Americans. *Id.*

[138] The appellate court remanded the case back to the district court to specify if the state had committed any practices of housing discrimination, and, if so, what portion resulted in segregative residential patterns. *Id.* at 410. The court felt this was necessary to determine whether an interdistrict remedy was appropriate and to fashion an appropriate remedy. *Id.* This remand was required by Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). Under *Brinkman*, the district court must first determine how much incremental effect the violations had on the racial imbalance in the school system.

[139] The court stated as follows:

> [t]he suburban school officials may not maintain that their districts must be excluded from any interdistrict remedy because they may be innocent of committing any constitutional violations, and they should not be held responsible for the acts of state legislators or other state subdivisions such as a local housing authority or a zoning board.

arguments that they should not be held liable for the wrongful acts of the local housing authority or zoning board, the court cited *Cooper v. Aaron*[140] and held as follows:

> The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. *That remedy may include school districts which are its instrumentalities and which are the product of the violation.* Thus, if state discriminatory housing practices have a substantial interdistrict effect, it is appropriate to require school authorities to remedy the effects even though they did not themselves cause this aspect of school desegregation.[141]

As a result, under the single-sovereign assumption theory, both the city public school system and suburban school systems may be held responsible for correcting the wrongful effects of state housing discrimination.

The single-sovereign assumption theory is a valid tool to remedy constitutional wrongs because it comports with the traditional principles of equity. The scope of the remedy, following this approach, does not exceed the extent of the constitutional violation. In contrast to the agency and vicarious liability theories,[142] the single-sovereign assumption theory does not allow the equitable remedy to exceed the "geographical area of operation of the housing authority or other governmental entity found guilty of [the] constitutional violations."[143] Furthermore, the scope of the remedy is limited to the extent that the housing discrimination is a cause of school segregation.[144]

An alternative method of holding school districts responsible for correcting the wrongs of residential segregation may be the tort concert of action theory.

Board of Sch. Comm'rs, 573 F.2d at 410.

[140] 358 U.S. 1 (1958).

[141] *Board of Sch. Comm'rs*, 573 F.2d at 410 (emphasis added) (citation omitted).

[142] The agency and vicarious liability theories for third party liability were rejected by the Supreme Court because they violated this principle. Under both theories, a violation by a local school board would have been sufficient to justify a state-wide desegregation remedy. *See supra* text accompanying note 129.

[143] Harding, *supra* note 17, at 347.

[144] *Id.* As in all cases, plaintiffs must show a causal connection between the unconstitutional actions or policies of state housing officials and the racial composition of the school districts intended to be remedied. This requirement of a causal connection allows the single-sovereign assumption theory to comport with *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979). In *Brinkman*, the Court found that courts only have discretion to remedy the "incremental segregative effect." *Id.* at 531–32. For a discussion of the requirement of causal connection, see Harding, *supra* note 17, at 348–53.

The concert of action theory imposes liability on a third party for the tortious conduct of another.[145] According to Prosser, the concert of action theory applies to:

> [a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. . . . Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .[146]

Even though the concert of action theory has been applied in tort litigation, its rationale of distributing liability to all parties who have benefited from the wrongful acts should also apply to school desegregation cases.[147] Chief Justice Burger's language in *Milliken* supports such an extension of the law.[148] In essence, under the concert of action theory, the courts should have the authority to hold school districts that have "benefitted" from residential segregation partially liable for remedying the constitutional violation through interdistrict school desegregation orders.

The opinions in *Board of School Commissioners*[149] and *Evans v. Buchanan*[150] seem to have applied the concert of action theory to order a metropolitan-wide remedy. In both cases, the district court found discriminatory housing practices that had a direct effect upon the racial compositions of the city and suburban school districts. In *Evans*, the court

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[145] For a detailed discussion of the concert of action theory, see Note, *Industry-Wide Liability*, 13 SUFFOLK U. L. REV. 980 (1979).

[146] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984). The concert of action theory requires a finding of three elements: a common design or a conspiracy, an action(s) which aids or encourages the wrongdoer, and the knowledge that his action or encouragement will result in a breach of duty. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

[147] *See* James A. Kushner & Frances E. Werner, *Metropolitan Desegregation After* Milliken v. Bradley*: The Case for Land Use Litigation Strategies*, 24 CATH. U. L. REV. 187, 208–15 (1975); Kevin J. Smith, *Federal Housing and School Desegregation: Interdistrict Remedies Without Busing*, 25 ST. LOUIS U. L.J. 575, 596 (1981).

[148] In the majority opinion, Chief Justice Burger stated that even a school district that had not committed a constitutional violation, but had been significantly affected by the violation, may be held liable for the violation. Milliken v. Bradley, 418 U.S. 717, 744–45 (1974). In essence, this is the concert of action theory. A third party school district that has adopted the acts of the wrongdoer (the inner city school district) for its own benefit (to have an all-white school district) is held liable for the acts of the wrongdoer.

[149] 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp 83 (S.D. Ind. 1978), *aff'd in part, vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 338 (1980).

[150] 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

relied on a history of residential discrimination by both state and federal housing authorities,[151] which were designed to create all-white suburban areas, to include the suburban school districts that benefitted from those discriminatory practices in the school desegregation order.[152] In the *Board of School Commissioners* case, the court relied upon the practice of placing public housing solely within the Indianapolis public school system, when the housing authority also had the power to locate public housing units in the neighboring suburban areas, to hold the suburban school districts liable for remedying the effects of residential discrimination in the school system.[153]

The concert of action theory will be used primarily to hold the suburban school districts liable. However, it may be applied by the court only if it recognizes that the development of the suburban area and its racial composition has been influenced by racially motivated policies and practices of federal, state, and local housing authorities in connection with private real estate developers and agents. As the court found in *Liddel v. Board of Education*,[154]

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[151] Among the discriminatory practices were the following: (1) the 1936 Federal Housing Administration mortgage underwriting manual, which continued in use until 1949, advocating racially and economically homogeneous neighborhoods; (2) the Delaware Real Estate Commission, a state licensing agency, publishing the Code of Ethics of the National Association of Real Estate Boards which denounced the introduction of "member of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood;" (3) the Multi-List established by the Greater Wilmington Board of Realtors, which listed as "open" those listings in which the owner was willing to sell to a minority buyer, indicated that 51% of all new listings in the City of Wilmington were open, but only 7% of new listings in the suburbs were open; (4) operation of over 2000 public housing units by the Wilmington Housing Authority within the city of Wilmington and fewer than 40 of such units in the suburbs; and (5) refusal of suburban governments to grant the necessary zoning or site approval to the County Housing Authority to establish public housing. *Evans*, 393 F. Supp. at 434–35.

[152] *Id.* at 438 ("[W]e nevertheless conclude that governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades. This conduct constitutes segregative action with inter-district effects under *Milliken*.").

[153] United States v. Board of Sch. Comm'rs, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part, vacated in part*, 631 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 338 (1980).

[154] 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd and remanded sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826, *on remand*, 491 F. Supp. 351 (E.D. Mo. 1980). This court decision slightly varies from traditional school desegregation cases. In addition to the traditional desegregation order, the court also attempted to balance the racial composition between the city and the suburban school districts by requiring the suburban areas to establish and develop public housing units within their school districts.

evidence of a history of housing segregation can be found in the use of restrictive covenants, racial steering by real estate developers and brokers, site selection of public housing, zoning laws, and discriminatory use of federal housing assistance monies. Together, these discriminatory practices effectively exclude African Americans and other people of color from the suburban areas and reinforce segregation within city and suburban school districts.[155]

Even though the single-sovereign assumption and the concert of action theories provide plaintiffs with arguments to hold school districts liable for the residential housing practices within their attendance lines, they are insufficient in and of themselves to justify a metropolitan-wide or an interdistrict desegregation order. To have the discretion to grant such an order, the courts must closely analyze the facts to find evidence sufficient to satisfy the second element of *Milliken's* two-part test.

B. *"Significant" Segregative Effect—What Does It Take?*

After plaintiffs have established that the intentional acts of government officials have caused a segregative effect upon their school system, they are entitled to a recovery. However, the court's authority to grant a desegregation order is limited to one which is intradistrict in scope.[156] Only upon a showing that the intentional acts of the government officials had a "significant segregative effect" on another public school system may the court grant a metropolitan-wide or an interdistrict remedy.[157]

The courts have recognized that various acts by state officials, including local school boards, in one school district may have a segregative effect. In *Keyes v. School District No. 1*, the Supreme Court explained that the practice of concentrating African-American students in certain schools has a reciprocal effect of keeping other nearby schools predominately white.[158] The Court also held that the practice of constructing new schools of a certain size at a certain location, with conscious knowledge of the racial impact, has a substantial reciprocal effect on the racial composition of other nearby schools.[159] From the foregoing, it is clear that practices which tend to keep the racial composition of the inner city and its public schools primarily African American also have the reciprocal effect of allowing the racial composition of the suburban areas and their school districts to remain predominately white in population.

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155 *See* Smith, *supra* note 147, at 597.

156 *See supra* notes 38–43 and accompanying text.

157 *See supra* notes 41–42 and accompanying text.

158 Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 201 (1973).

159 *Id.*

The difficulty in obtaining an interdistrict remedy is not proving a reciprocal discriminatory effect. Instead, the difficulty lies in proving that such discriminatory effect was "significant."

Significant segregative effect—What is it? What does it take? Similar to its approach with segregative intent, the Supreme Court has provided the lower courts with little, if any, idea of what constitutes a significant segregative effect. In an attempt to give a cursory explanation of the concept, the Supreme Court in *Milliken* stated that "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial cause* of interdistrict segregation."[160] However, this explanation provides as little guidance as the original concept itself.

The common interpretations of each adjective, likewise, do little for civil rights practitioners. According to Webster, significant is defined as "meaningful" or "important"; substantial means "material," "considerable," or "of an essential character."[161] Black's Law Dictionary fails to define significant and defines substantial as merely "of real worth or importance."[162] As a result, plaintiffs are left analyzing the facts of cases to establish a rough estimate of what numerical figures may or may not constitute a significant or a substantial segregative effect.

The facts in two cases provide examples of what does not constitute a significant segregative effect. The court of appeals in *Milliken* found evidence in the record that during the 1957–58 school year the Detroit school system had contracted with a suburban school district to educate the suburb's African-American high school students.[163] However, the Supreme Court believed that the effect of busing these African-American high school students was not substantial, but de minimis.[164] In a Fifth Circuit case, the court held that the interdistrict transfer of eleven African-American children was not significant enough to justify the inclusion of the suburban school district in the remedy.[165]

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[160] Milliken v. Bradley, 418 U.S. 717, 745 (1974) (emphasis added).

[161] WEBSTER'S II NEW RIVERSIDE DICTIONARY 643, 686 (3rd ed. 1984).

[162] BLACK'S LAW DICTIONARY 1428 (6th ed. 1990).

[163] Bradley v. Milliken, 484 F.2d 215, 231 (6th Cir.), *rev'd*, 418 U.S. 717 (1974). The suburban African-American high school students were bused away from nearby white suburban high schools, past Detroit all-white high schools, to the Detroit African-American high schools.

[164] *Milliken*, 418 U.S. at 749–50 (finding that this "isolated instance" involving the two school districts was not significant enough to justify a metropolitan-wide desegregation order).

[165] Tasby v. Estes, 572 F.2d 1010, 1015 & n.19 (5th Cir. 1978), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas N.A.A.C.P., 444 U.S. 437 (1980).

In contrast, the Seventh Circuit has provided some guidance as to what figure may constitute a significant segregative effect. In *United States v. Board of School Commissioners*, the court held that the segregative housing of 5000[166] people of color caused a significant segregative effect in the suburban school district.[167] However, this case does not establish that when an act causes 5000 African-American students to be prevented from attending a suburban all-white school district an interdistrict remedy is proper as a matter of law. Instead, determining what figures do and do not constitute a "significant" effect lies within the discretion of the individual trial judge.

Although numerical figures would be helpful, most courts have not utilized such an approach to find a substantial effect. Instead, the trend has been for courts to look at various acts and make a factual determination as to whether the act would, theoretically, have a significant segregative effect. For example, the Supreme Court in *Milliken* stated that a significant segregative effect may exist where the state has deliberately drawn school district lines on the basis of race.[168] Other courts have also held that a significant segregative effect existed when an African-American school district was not consolidated with neighboring white school districts[169] or when state law prevents an inner city school district, which is predominately African American, from being consolidated with other school districts.[170]

In light of the metamorphosis of de jure discrimination into de facto discrimination and the fact that school boards now know not to act as the defendants did in prior cases, it is doubtful that school boards or other state defendants will act in such an openly discriminatory fashion. As a result, plaintiffs will likely be forced to look to other facts to establish a significant segregative effect.

Even though the use of housing discrimination has not been sanctioned by the Supreme Court as relevant evidence of segregative intent, a finding of housing discrimination by federal, state, and/or local housing authorities in and of itself may constitute a significant segregative effect. In *Evans* and *Board of*

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[166] 506 F. Supp. 657, 664 (S.D. Ind. 1979), *aff'd in part, vacated in part*, 637 F.2d 1101, 1109–10 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[167] United States v. Board of Sch. Comm'rs, 637 F.2d 1101, 1109–10 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

[168] Milliken v. Bradley, 418 U.S. 717, 745 (1974).

[169] *See* Morrilton Sch. Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979), *cert. dismissed*, 444 U.S. 1050, *and cert. denied*, 444 U.S. 1071 (1980) (indicating interdistrict relief is properly ordered when one district was almost entirely African American and included territory that would have been properly consolidated with the surrounding school districts were it not for racial considerations).

[170] *See* Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

School Commissioners, the courts held that various housing discrimination violations by various parties were sufficient to provide a basis for granting interdistrict desegregation orders.[171] The court in *Evans* noted that the housing authority had constructed over 2000 public housing units within the city limits, but less than 40 units in the outlying suburban areas.[172] However, this opinion cannot be interpreted to mean that such a great disparity in treatment is a prerequisite to a finding of a significant interdistrict effect.

Finally, there is precedent for the argument that the enactment or repeal of legislation by the state legislature which effectively increases segregation within a school district may be sufficient, in and of itself, to find a significant segregative effect. In the *Board of School Commissioners* case, the Seventh Circuit held that "the enactment of UniGov and its companion legislation . . . may provide a basis for implementing interdistrict relief."[173] Because this language is permissive, it does not create a significant segregative effect as a matter of law. However, such an approach is consistent with the courts' reluctance to create rules of law in the context of school desegregation.

V. CONCLUSION

In the year 1994, African-American students are finding themselves void of the promises of *Brown*. When coupled with the conservative approach of the Supreme Court, plaintiffs may find themselves without a viable remedy to compensate them for the harm they have incurred. In many instances, the vestiges of state-imposed segregation cannot be eliminated root and branch with a single-district remedy. As a result, plaintiffs will not be able to be restored to the position they were in prior to the constitutional violation in the absence of an interdistrict or metropolitan-wide remedy.

Milliken established the two-part test for granting interdistrict or metropolitan-wide remedies. However, with its insistence on evidence of segregative purpose or intent, the Supreme Court may have effectively immunized state officials from liability. Plaintiffs have been provided with a few examples of what the courts believe are indicia of segregative intent. To

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[171] United States v. Board of Sch. Comm'rs, 573 F.2d 400, 410 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978) ("We hold that . . . state discriminatory housing practices may provide a basis for implementing interdistrict relief . . . ."); *Evans*, 393 F. Supp. at 438 (When "governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades . . . their conduct constitutes segregative action with inter-district effects under *Milliken*.").

[172] *Evans*, 393 F. Supp. at 435.

[173] *Board of Sch. Comm'rs*, 573 F.2d at 410.

further complicate litigation, the courts are split as to whether to allow the introduction of evidence of housing discrimination. Housing discrimination as evidence of segregative intent could be the panacea for plaintiffs in school desegregation actions. Unfortunately, the future of the housing approach to recovery is uncertain because the Supreme Court has not addressed the appropriateness of this line of evidence.

Likewise, the future is uncertain as to what will constitute a significant or substantial segregative effect. Is the primary focus to be on numerical figures or may it be presumed from the discriminatory degree of the defendant's conduct?

While the future is uncertain with respect to many issues in school desegregation cases, such uncertainty also provides hope. This uncertainty also provides creative plaintiffs with the possibility of trailblazing in areas not previously explored. As a result, we should all look at school desegregation law as an opportunity to create history and case law rather than merely reading it.